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No. 24

In the Supreme Court of the United States

OCTOBER TERM, 1931

GULF STATES STEEL COMPANY AND NATIONAL SURETY COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1931

No. 821

GULF STATES STEEL COMPANY AND NATIONAL Surety Company, petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No formal opinion was rendered by the District Court for the Northern District of Alabama. The District Judge, however, expressed his views in a letter to counsel, which is referred to in the opinion of the court below. (R. 191.) The letter is printed as an appendix, *infra*, pp. 15–16. The majority and dissenting opinions of the Circuit Court of Appeals (R. 190–200) have not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered February 19, 1932. (R. 200–201.) The petition for certiorari was filed March 26, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a decision by the Board of Tax Appeals that the collection of income taxes was barred by the statute of limitations, extinguishes the liability under a bond referring to a claim for abatement and conditioned upon the payment of so much of the amount of the claim as was not abated. This bond was the third of a series of such bonds, the first being executed before the statutory period of limitation expired.

STATUTES INVOLVED

As this is an action to enforce contractual liability on a bond, there are no statutes directly involved. Under our view of the case, we do not deem the statutes referred to in the petition for certiorari and supporting brief to be controlling.

STATEMENT

This action was brought by the United States to recover from the petitioner Gulf States Steel Company, hereinafter called the Company, as principal, and the petitioner National Surety Company, as surety, on a bond given September 9, 1925, to

the Collector of Internal Revenue for the District of Alabama in connection with a claim made by the Company for the abatement of an additional assessment of income taxes for the year 1917.

According to the averments of the Government's bill of complaint (R. 1–17), which were supported in all material respects by the evidence contained in the bill of exceptions (R. 54 *et seq.*), the Company filed its income tax return for 1917 on March 28, 1918. On the April, 1921, list of income tax assessments the Commissioner of Internal Revenue assessed additional taxes for 1917 in the amount of $153,815.30 against the Company. Notice of this additional assessment and demand for payment was served upon the Company on May 2, 1921. On May 6, 1921, the Company filed a claim for the abatement of the full amount of such additional assessment.

On March 13, 1923, fifteen days before collection would have been barred by the applicable statute of limitations (Section 250 (d), Revenue Act of 1921, c. 136, 42 Stat. 227, 265), while the claim for abatement was still undetermined and the Collector of Internal Revenue was demanding payment of the additional assessment, the Company, as principal, and the American Surety Company, as surety, executed and delivered to the Collector of Internal Revenue a bond conditioned as follows (R. 20):

> The condition of the above obligation is such that, if the said Gulf States Steel Com-

> pany will indemnify the said W. E. Snead as Collector as aforesaid, or his successor in office, against all loss, cost, damage, and expense to which he may be put by reason of having allowed the said Gulf States Steel Company to withhold the payment to him, as such Collector, of the sum of One Hundred and Fifty-three Thousand Eight Hundred Fifteen and 30/100 Dollars ($153,815.30), claimed of it under the War Revenue Act of 1917, pending the filing, by the said Gulf States Steel Company of additional facts and information in support of a claim for the abatement of said amount heretofore filed by it, then this obligation to be null and void, otherwise, to be and remain in full force and effect.

On April 3, 1925, while the claim for abatement was still undetermined and open to the production of further evidence, the Company executed and delivered to the United States another bond bearing the following condition (R. 22):

> The condition of the above obligation is such that, whereas the Gulf States Steel Company did execute a bond in the penal sum of One Hundred Seventy-five Thousand, Three Hundred and Fifty Dollars ($175,350), and in favor of W. E. Snead, Collector of Internal Revenue, for the District of Alabama, which said bond was signed by the American Surety Company of New York, as surety, under date of the 13th day of March,

> 1923, and was given in support of a claim for the abatement of assessments, penalties and interests, under the Revenue Act of 1917. Being desirous of relieving the above bound surety Company and further securing the payment of any amount found to be due the United State government under the above Revenue Act, now, therefore, if the undersigned Gulf States Steel Company shall pay to W. E. Snead, Collector, or his successors in office, such amount of the claim as is not abated, together with all costs, damages, penalties, interest, or other expense connected therewith, then this obligation shall be void, otherwise it shall remain in full force and effect.

In lieu of surety the Company pledged $200,000 in Government bonds as security for the performance of its obligations under the foregoing bond.

On September 9, 1925, the claim for abatement being still undetermined, the Company as principal, and the petitioner National Surety Company, as surety, executed and delivered a third bond, the one sued on in this action. The condition of this bond was as follows (R. 30):

> The condition of the above obligation is such that, whereas, an additional income tax has been assessed for the year 1917 in the sum of One Hundred Fifty-three Thousand Eight Hundred and Fifteen Dollars and Thirty Cents ($153,815.30), with penalty and

interest against the Gulf States Steel Company of Birmingham, Alabama. A claim for the abatement of the additional tax was filed with the Collector of Internal Revenue for the District of Alabama at Birmingham. On the third day of April, 1925, the Gulf States Steel Company did execute its bond securing the payment of so much of the additional assessment, penalties and interest as is not abated. In lieu of surety on the above bond the said company did deposit with the Federal Reserve Bank of New York, under Section 1029 of the Revenue Act of 1924, the following described United States, Fourth Liberty Loan 4¼% Gold Bonds of 1933–8 series, being of the par value of $200,000 (coupons), numbers * * *. The above bonds were deposited on account and subject to the orders of W. E. Snead, Collector of Internal Revenue for the District of Alabama. Now, therefore, if W. E. Snead, Collector of Internal Revenue, shall release and surrender the said bonds to the said Company, and the principal, or sureties, either or both, shall pay to said Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon as provided by Law, then this obligation shall be of no effect. Otherwise it shall remain in full force.

On December 4, 1925, the Commissioner of Internal Revenue, having considered the claim for abatement and the additional information fur-

nished by the Company, notified the Company that he would reject the claim, and on May 12, 1926, did reject it in its entirety. Demand was made upon the petitioners for payment, which was refused.

To the Government's bill of complaint, each of the petitioners filed a separate plea, which denied generally the allegations of the complaint and specially pleaded a decision of the Board of Tax Appeals as constituting an abatement of the tax. (R. 43–45, 46–49.) From these special pleas and also from the evidence contained in the bill of exceptions (R. 71 *et seq.*) it appears that on July 9, 1926, the Company petitioned the Board of Tax Appeals for a review of the decision of the Commissioner rejecting the claim for abatement. (R. 159.) On March 4, 1927, an amended petition was filed which for the first time pleaded the statute of limitations as a bar to the collection of the tax. (R. 133–134, 135, *et seq.*) After a hearing the Board held that the collection of the tax was barred by the statute of limitations and that there was no deficiency for the year 1917. (R. 105, 116.) A petition for review of this decision of the Board was filed in the court below by the Commissioner on April 9, 1929. (R. 91.) This petition was dismissed on motion of the Commissioner on December 3, 1929 (R. 78), and the Board's decision became final.

To that part of petitioners' pleas setting up the decision of the Board of Tax Appeals the Govern-

ment filed demurrers. (R. 50–51.) These demurrers were sustained (R. 52–53), issue was joined on the remainder of petitioners' pleas, the case was tried before a jury, a verdict was returned for the Government, and judgment entered accordingly (R. 53). Motions for a new trial were overruled. (R. 175–176.) Upon appeal, the Circuit Court of Appeals affirmed the judgment, one judge dissenting. (R. 200–201.)

ARGUMENT

We believe that this case is governed in principle by the decision of this Court in *United States* v. *John Barth Co.*, 279 U. S. 370. In that case the Barth Company, in consideration of the United States refraining from the collection of taxes outstanding against the Company for 1918 pending an adjudication of certain claims for abatement, executed and delivered to the Commissioner of Internal Revenue a surety bond, which bound it and its surety to pay "on notice and demand by the collector * * * any part of such tax found by the Commissioner to be due." At the time the claims for abatement were filed and the bond given, the statute of limitations had not run against the collection of the taxes. The Commissioner considered the claims for abatement but allowed them only in part. The Barth Company and its surety were notified and payment under the bond of the taxes as determined was demanded. Payment was

refused, and the United States instituted suit on the bond. The Barth Company and its surety demurred to the Government's petition on the ground that the action was not commenced within the time prescribed by certain statutes of limitations relating to suits or proceedings for the collection of taxes. This Court held that these statutes did not apply, saying (pp. 375, 376):

> The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded to bar the suit can not be extended by implication to a suit upon a subsequent and substituted contract. The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given. If there is any limitation applicable to a suit on the bond, it is conceded that it has not yet become effective. * * * To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and

> he should not object to making good the contract by which he obtained the delay he sought.

In the instant case, at the time the claim for abatement was filed and the first bond was given, the statute of limitations, although about to run against collection of the additional taxes, had not yet run. On its face the bond shows clearly that the intent of the parties was to save the Government from any loss which might result from the delay occasioned by the permission given the Company to present additional information in support of its claim for abatement. At that time (March 13, 1923) the Board of Tax Appeals had not yet been created. It is, therefore, evident that the parties then contemplated that liability on the bond should depend upon the determination of the Commissioner of Internal Revenue on the claim for abatement. The second bond executed by the petitioner referred both to the first bond and the claim for abatement. It recited expressly that it was for the purpose of relieving the surety on the first bond of his obligation thereunder. But to protect the Government it also provided that it was executed for the further purpose of "securing the payment of any amount found to be due the United States government under the above Revenue Act," and also made provision for the deposit

by the Company as a pledge, in a Federal Reserve Bank, of $200,000 in Government bonds. The third bond, the one in suit, while not mentioning the first bond, did refer to the second bond as well as the claim for abatement, and it shows that the primary purpose for which it was given was to obtain the surrender of the Government bonds which the Company had deposited under the second bond, substituting therefor the obligation of a surety. The condition of both the second and third bonds was that the principal should pay "so much of the claim as is not abated."

Under the *Barth* decision, *supra*, there can be no question that liability under the first bond was not affected by the running of the statute against the collection of the taxes *qua* taxes. There is nothing in the two later bonds to indicate an intent of the parties to change the situation. The substitution of them for the original bond was manifestly permitted as an accommodation to the Company. These bonds were given after the Board of Tax Appeals had been created and the statutes permitted review by that Board of the action of the Commissioner on claims for abatement, and, under its power to determine deficiencies in taxes, the Board had jurisdiction to determine that there was no deficiency in tax in the instant case because the statute of limitations barred collection. But the

condition of the bond in suit must be given a meaning which will effectuate the intention of the parties. *Hill* v. *American Surety Co.,* 200 U. S. 197, 203; *Cooke* v. *Graham's Administrator,* 3 Cranch 229, 235. Bonds must be construed sensibly, and common sense forbids the conclusion that the parties contemplated that a decision of the Board that the taxes had abated on the ground that the statute had run against collection, met the condition of the bond. As the court below said (R. 194–195), the word "abate" used in the condition of the bond has "many shades of meaning," and it was there patently used in the sense of a finding which went not to the collectibility of the tax but to the legality of the assessment. Otherwise the second and third bonds were merely futile gestures, as collection of the tax was barred at the time they were delivered.

The Board in its opinion (R. 116) expressly recognized that its decision "in no wise disposes of any question arising as to liability on the bond," and its decision obviously went only to the enforceability of the tax as a tax. The liability of petitioners on the bond was in no wise affected by that decision, and we see no material difference between this case and the *Barth case.* While in this case the statute of limitations upon collection was not pleaded directly as a bar to this action, the effect of the plea of the Board's decision is the same in

substance and the principle of the *Barth case* is applicable. Should the contention of petitioners prevail, the statute of limitations will have prevented the enforcement of the contractual liability just as effectively as though it had been successfully pleaded as a direct bar. It would be accomplishing indirectly what the *Barth case* holds may not be done directly.

There are now pending before the various District Courts seven cases involving analogous questions, although the bonds involved in those cases vary in their phraseology. In *United States* v. *Martin Hotel Co.*, 52 F. (2d) 161, the District Court for Nebraska decided a substantially similar question adversely to the Government, and that case is now pending on the Government's appeal in the Circuit Court of Appeals for the Eighth Circuit. We are informed by the Bureau of Internal Revenue that there are other cases pending in the Bureau in which suits have not been filed. Aside from the instant case we are advised that the cases in which analogous questions are involved affect taxes amounting to approximately $350,000. There is no present conflict with decisions of other Circuit Courts of Appeals. Unless and until a conflict does develop there would seem to be no necessity for a review of the question by this Court.

CONCLUSION

The decision of the court below was correct and the petition should be denied.

Respectfully submitted.

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APRIL, 1932.

APPENDIX

APRIL 20, 1931.

Hon. AUGUSTUS BENNERS,
Attorney for Defendant.
Hon. JIM C. SMITH,
United States Attorney.

GENTLEMEN: Referring to the case of the *United States* v. *Gulf States Steel Company,* I think the *Barth case* controlling in favor of the plaintiff. In the instant case the bond sued on was given before the statute of limitations had been run against the collection of the tax. In the *Barth case* the Supreme Court held that "the limitations of Sec. 250 (d) has no application to a situation following a claim of abatement and the giving of a bond." The Court also said: "The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay sought." The condition of the bond was: "If the principal or sureties, either or both, shall pay to said collector so much of the amount of the claim as is not abated, etc." In view of the *Barth case,* I do not think the claim was abated by a determination of the Board of Tax Appeals that the statute of limitations had run against the collection of the tax, by distraint or

suit. If so construed it would be inconsistent with the holding of the *Barth case* that one purpose of giving the bond was "to prevent the running of time against the government." It would not do that if the limitations applied directly or indirectly through the determination of the Board of Tax Appeals as well to a suit on the bond as to the collection of the tax. The *Barth case* also holds that an action on the bond is a substituted remedy to the collection of the tax by suit or distraint and that the limitation applicable to a suit on the bond, if any, and not that applicable to the collection of the tax, is the appropriate one.

Entertaining this view, I think the United States is entitled to a judgment.

If the defendant has any remedy it would be based upon a redetermination by the Board of Tax Appeals on the merits and not upon a finding that there was no deficiency for 1917 tax because the statute of limitations had barred its collection.

I will sign an appropriate order when presented.

Respectfully,

W. I. GRUBB,
District Judge.

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